

Chapter 2

Key issues

2.1 Following the federal election in 2013, the Australian Government implemented 18 policy measures then comprising the Deregulation Agenda.¹ However, two years later, in 2015 the Australian Chamber of Commerce and Industry (ACCI) published its third Red Tape Survey showing that regulatory burden continued to concern small to large businesses:

The majority of respondents [73 per cent] believe the amount of red tape has increased over the past 12 months...nearly half of the respondents [47.2 per cent] reported that the impact of regulation had prevented them from making changes to grow their business.²

2.2 Throughout 2017–2018, the committee conducted a series of interim inquiries, where it consistently heard that the concerns expressed in the ACCI survey have not abated. Chapter two discusses some of these concerns within the context of the Deregulation Agenda policy and process.

The regulatory landscape

2.3 In Australia, there are more than 70 Commonwealth departments and agencies involved in making and administering regulations.³ This is in addition to state, territory and local government regulators, as well as Ministerial Councils and other national standard-setting bodies.⁴

Stock of regulation

2.4 Regulation takes various forms, from primary and subordinate legislation to codes, instruments and standards (quasi-regulation). In 2014, a stocktake of Commonwealth regulation revealed a regulatory footprint of approximately 1800 pieces of primary legislation (two per cent), 12 200 subordinate instruments (four per

1 Liberal Party of Australia, *The Coalition's Deregulation Reform Discussion Paper*, November 2012, Box 2, pp. 9–11.

2 Australian Chamber of Commerce and Industry, *ACCI 2015, National Red Tape Survey*, 2015, p. 5, <https://www.australianchamber.com.au/publication/taxonomies/red-tape-survey/> (accessed 30 November 2018). Also see: pp. 7 and 14.

3 Peter Cully, Group Manager, Department of Jobs and Small Business, *Committee Hansard*, 2 November 2018, p. 6. Each department has its own regulatory reform unit (sometimes called a portfolio deregulation unit).

4 Matthew Lesh, Research Fellow, Institute of Public Affairs, *Committee Hansard*, 2 November 2018, p. 11; Mark McKenzie, Chair, Council of Small Business Organisations of Australia, *Committee Hansard*, 2 November 2018, p. 23, who both noted the existence of independent or 'shadow' regulators operating outside established regulatory frameworks.

cent) and 71 000 pieces of quasi-regulation (84 per cent).⁵ The compliance cost of these 85 000 regulations was estimated at \$65 billion annually (about 4.2 per cent of Gross Domestic Product, GDP).⁶

2.5 The Institute of Public Affairs (IPA) estimated red tape reduces economic output by \$176 billion or ten per cent of GDP:

Red tape is the single biggest barrier to economic opportunity and prosperity in Australia. Each year red tape reduces economic output by \$176 billion, which is around 10 per cent of GDP. This represents all of the businesses which are never started, the jobs never created, and the pay rises which never materialise because of red tape.

Red tape is one of the key causes behind low rates of private business investment in Australia, which currently sits at just 11.8 per cent of GDP. This is lower than the rate that prevailed during the economically-hostile Whitlam years. Low business investment is in turn a key cause of slow wages growth, which has been stagnant in the private sector in real terms for the past three years.⁷

2.6 In the interim inquiries, stakeholders commented on the amount of regulation affecting their industries, with many claiming their industry is highly or over-regulated. In the tobacco retail inquiry, for example, the National Retail Association submitted that there is 'an excessive red tape burden on retailers in each state'.⁸

2.7 The IPA submitted that, despite the Deregulation Agenda, the scale and scope of regulation has expanded in recent years, with more than 107 000 pages of regulation introduced since 2013. The majority of this regulation has been created through subordinate legislation (85.6 per cent), instigated by 'an unelected administrative state which is gradually eroding the rule of law'.⁹

2.8 IPA argued that there should be structural mechanisms to constrain the ability of government to expand regulation—such as a 'one-in, two-out' approach to

5 Australian Government, *The Australian Government Annual Deregulation Report 2014, 2015*, p. 19, https://docs.jobs.gov.au/system/files/doc/other/australian_government_annual_deregulation_report_2014.pdf (accessed 30 November 2018).

6 Australian Government, *The Australian Government Annual Deregulation Report 2014, 2015*, p. 24.

7 Institute of Public Affairs, *Submission 5*, p. 1.

8 Senate Select Committee on Red Tape, Effect of red tape on tobacco retail, National Retail Association, *Submission 7*, p. 1.

9 Institute of Public Affairs, *Submission 5*, Attachment 1, pp. 5–6.

regulatory reduction. Its representative, Matthew Lesh, suggested also that there is a need for simple and clear drafting of regulation.¹⁰

2.9 Dr Craig Latham, representing the Australian Small Business and Family Enterprise Ombudsman (ASBFEO), said that reducing the quantum only addresses part of the problem: 'the churn has its own costs here as well. For small business, changing—even if you're taking two out and putting one in—itsself is a problem'.¹¹

2.10 The Council of Small Business Organisations Australia (COSBOA) and its Chair, Mark McKenzie, argued that the focus should not be on volume but on having 'good regulation and good regulators'. Mr McKenzie said:

It's about the nature of the policies and the objectives they have rather than the number. Certainly, from a small business perspective, we're not going to advocate for small policies. It's about having the right ones and the right number relative to what we're trying to achieve.¹²

2.11 Both Mr McKenzie and Adam Carr from ACCI added that there is also a problem with how business is being regulated. Mr Carr said:

It is not so much about regulation per se...it's about the way we do it...It's the works, the length, the volume and the multiple jurisdictions that people have to deal with. So there is a sense of, 'Let's get the building blocks and the process right first and red tape will reduce.' Red tape is that part of regulation which imposes an unnecessary or needless burden. It's not that we don't need regulation; we do. It's just we don't want to waste our time doing it.¹³

2.12 The COSBOA representative agreed that 'the key failure we see is the implementation' of regulation:

There seems to be thinking inside government that small business is a little big business, when in actual fact it's not. It doesn't have a small IT department. It doesn't have a small HR department. It tends to be one or two people in the family enterprise. They're effectively shouldering the entire compliance burden. I think there's a failure of government and regulators to understand that at times.¹⁴

10 Institute of Public Affairs, *Submission 5*, p. 1; Matthew Lesh, Research Fellow, Institute of Public Affairs, *Committee Hansard*, 2 November 2018, p. 11; Kurt Wallace, Research Fellow, Institute of Public Affairs, *Committee Hansard*, 2 November 2018, p. 18.

11 Dr Craig Latham, Deputy, Australian Small Business and Family Enterprise Ombudsman, *Committee Hansard*, 2 November 2018, p. 17.

12 Mark McKenzie, Chair, Council of Small Business Organisations of Australia, *Committee Hansard*, 2 November 2018, p. 18. Also see: Council of Small Business Organisations of Australia, *Submission 8*, p. 1.

13 Adam Carr, Chief Economist and Director, Economics and Industry Policy, Australian Chamber of Commerce and Industry, *Committee Hansard*, 2 November 2018, p. 2.

14 Mark McKenzie, Chair, Council of Small Business Organisations of Australia, *Committee Hansard*, 2 November 2018, p. 3. Also see: Dr Craig Latham, Deputy, Australian Small Business and Family Enterprise Ombudsman, *Committee Hansard*, 2 November 2018, p. 4.

2.13 COSBOA submitted that all governments, since at least the mid-1980s, have agreed that regulatory burden on business should be eliminated. However, extensive efforts in this regard have achieved little:

There have been at least 8 red tape busting task forces formed and reformed... There have also been any number of committees working within government departments and between government departments. There has also been the same number of committees and taskforces and forums at the state and territory levels. The outcomes of these committees and taskforces have been extraordinary to say the least. Things did not necessarily get better as a result of all this work and all these meetings and all those reports. The new red tape and compliance demands placed on small business over the last 25 years has been overwhelming.¹⁵

Types of red tape

2.14 One of the 'red tape busting task forces' referred to by COSBOA was the 2006 Taskforce on Reducing the Regulatory Burden (Taskforce), established to identify practical options for alleviating the compliance burden on business from Commonwealth regulation.¹⁶ As part of its work, the Taskforce identified five common themes of regulatory burden:

- excessive coverage, including regulatory creep;
- overlapping and inconsistent regulatory requirements;
- regulation that is redundant or not justified by policy intent;
- excessive reporting or recording burdens; and
- variations in definitions and reporting requirements.¹⁷

2.15 In each interim inquiry, submitters and witnesses described multiple instances of these types of red tape affecting their industry. Perhaps the most consistent concern was duplication in regulation between and among federal/state/other regulators. For example, in the private education inquiry, the National Catholic Education Commission referred to duplication in financial reporting to federal/state education

15 Council of Small Business Organisations of Australia, *Submission 8*, pp. 1–2. Also see: Australian Chamber of Commerce and Industry, *Submission 13*, p. 1.

16 Hon. John Howard MP, Prime Minister of Australia, and the Hon. Peter Costello MP, Treasurer, 'Taskforce on Reducing the Regulatory Burden on Business', *joint media release*, 12 October 2005, <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2005/087.htm&pageID=003&min=phc&Year=2005&DocType=0> (accessed 30 November 2018).

17 Regulation Taskforce, *Rethinking Regulation, Report of the Taskforce on Reducing Regulatory Burdens on Business*, January 2006, p. iii, <https://www.pc.gov.au/research/supporting/regulation-taskforce/report/regulation-taskforce2.pdf> (accessed 30 November 2018).

departments and the charities' regulator, the Australian Charities and Not-for-profits Commission.¹⁸

2.16 A related concern was whether the Australian Government sometimes acts beyond its authority, with state/territory governments having responsibility for certain areas. For example, in the sale, supply and taxation of alcohol inquiry, the Australian Hotels Association submitted:

The regulation of licensed premises concerned with the sale and supply of alcohol are appropriately managed at the State/Territory level. The capacity or need for the federal government to involve itself in matters of red tape within state and territory jurisdictions is limited. Further, there are matters best left to the state and territory governments to administer, taking into account the particular situations in their jurisdiction.¹⁹

2.17 Mr Lesh, Research Fellow at the IPA, argued that there is a continuing centralisation of power that undermines good governance principles, affecting both design and implementation:

The further you take the regulators in distance...both physically and symbolically away from those who are feeling the impact of the regulation, the less knowledge they're going to have. This is the classic Hayekian knowledge problem, which is that information is dispersed. That's effectively the reason why markets are so effective: they take advantage of that dispersed knowledge. But it's also a good justification for decentralised governance in itself. When the states and the federal governments both try to do things, it's quite problematic.²⁰

Regulation and red tape reduction

2.18 In 2014 and 2015, parliamentary sitting days were set aside for the repeal of unnecessary or redundant legislation and associated regulations (Autumn/Spring Repeal Days). In the first year, bills were introduced to repeal over 1,800 statutes and 10 000 legislative instruments; in the second year, legislation was introduced to repeal a further 1,796 statutes.²¹

18 Senate Select Committee on Red Tape, Effect of red tape on private education, National Catholic Education Commission, *Submission 9*, p. 2. Also see: Queensland Tourism Industry Council, *Submission 1*, p. 2.

19 Senate Select Committee on Red Tape, Effect of red tape on the sale, supply and taxation of alcohol, Australian Hotels Association, *Submission 8*, p. 2.

20 Matthew Lesh, Research Fellow, Institute of Public Affairs, *Committee Hansard*, 2 November 2018, p. 11. Also see: Ken Phillips, Executive Director, Self Employed Australia, *Committee Hansard*, 2 November 2018, p. 11.

21 Department of Jobs and Small Business, 'Reporting on the Deregulation Agenda', <https://www.jobs.gov.au/reporting-deregulation-agenda> (accessed 30 November 2018).

2.19 At the beginning of 2016, the Autumn/Spring Repeal Days were replaced by annual reports that are intended to assess regulatory performance.²² The first of these reports—the *Annual Regulatory Reform Report, 1 January 2016–30 June 2017*—summarised the Deregulation Agenda's progress to date in reducing regulation and red tape (which progress is measured in terms of compliance cost savings):

Since September 2013 the Government has now implemented over 1500 decisions estimated to yield around \$5.2 billion in net regulatory cost reductions; this represents almost 90 per cent of the net value of all reported decisions since 2013.²³

2.20 Around 190 reported decisions with a total net saving of about \$710 million have not been implemented, as the enacting legislation has not been passed in the Parliament. Among the larger decisions (> \$10 million) is the One Stop Shop initiative that aimed to create a single environmental assessment and approval process for nationally protected matters.²⁴

Measuring regulation and red tape reduction

2.21 ACCI's 2015 Red Tape Survey revealed that a majority of businesses (53.3 per cent) spent over \$10 000 in regulatory compliance costs in 2014 (up 6.4 per cent from 2013). More than half of all businesses (54.9 per cent) could not pass on any of these actual costs to consumers, which were in addition to time spent on compliance and lost opportunity costs.²⁵

2.22 A key element of the Deregulation Agenda is an annual regulation compliance cost reduction target of net \$1 billion.²⁶ Mr Lesh from the IPA acknowledged this objective but questioned whether the red tape burden should be measured with reference to compliance cost savings:

We have some issues in the way that the red tape burden is calculated, largely because that's purely related to compliance costs rather than a broader idea of the opportunity costs of red tape. The compliance cost of

22 Hendy, P., 'Opinion: Spent rules have no place in an innovative nation', *The Australian*, 4 February 2016, p. 12. Mr Hendy stated that the major work in cleaning up the statute books had been completed.

23 Australian Government, *Annual Regulatory Reform Report: 1 January 2016 – 30 June 2017*, 2017, p. 10, https://docs.jobs.gov.au/system/files/doc/other/annual_regulatory_reform_report_1_january_2016-30_june_2017-final.pdf (accessed 30 November 2018). The second annual report is currently being compiled: Peter Cully, Group Manager, Department of Jobs and Small Business, *Committee Hansard*, 2 November 2018, p. 13.

24 Australian Government, *Annual Regulatory Reform Report: 1 January 2016 – 30 June 2017*, 2017, pp. 10–11. Also see: Department of the Environment and Energy, 'One-Stop Shop for environmental approvals', <http://www.environment.gov.au/epbc/one-stop-shop> (accessed 30 November 2018).

25 Australian Chamber of Commerce and Industry, *ACCI 2015, National Red Tape Survey*, 2015, pp. 8–10. The survey also identified administrative areas of most concern.

26 Department of Jobs and Small Business, *Submission 14*, p. 2.

not doing something is very low, of course, but, if you ban something, the opportunity cost to the economy is quite high, which is why the IPA estimate of red tape is at \$176 billion a year that it costs the economy.²⁷

Departments' response

2.23 The Department of Jobs and Small Business (Department) submitted:

Australia is recognised internationally for its regulatory policy and governance arrangements. The ultimate aim of the Australian Government's regulatory efforts is to improve economic, social and environmental outcomes for all Australians.²⁸

2.24 A representative argued that the Deregulation Agenda has achieved considerable success, referring in particular to compliance cost savings to date (\$5.9 billion) but explaining that this is not the only measure of success:

It's certainly not the only measure. There certainly is a focus on costs, because it's a metric that is easiest able to be measured. But the underlying philosophy is that regulation should only impose where necessary and at the lowest cost, and, where there is going to be regulation, that those who are making the decision to impose or apply it are conscious of the burden and that the burden is justified.²⁹

2.25 An officer from the Department of Prime Minister and Cabinet (PM&C) clarified that policy proposals are developed in accordance with *The Australian Government Guide to Regulation*, which sets out seven guiding questions to focus policy-makers on the regulatory impact of major decisions. It also includes 'Ten Principles for Australian Government Policy Makers' to help regulators answer those questions.³⁰

Committee view

2.26 Australia has a complex regulatory landscape, with regulation and red tape continuing to concern business five years after introduction of the Deregulation Agenda. A key concern is the sheer volume of regulation, although the committee acknowledges other factors (such as breadth, length and complexity). Another concern is the preponderance of five types of red tape that exist across multiple sectors.

27 Matthew Lesh, Research Fellow, Institute of Public Affairs, *Committee Hansard*, 2 November 2018, p. 2. Mr Lesh identified alternative options for measuring regulation and red tape reduction. Also see: Kurt Wallace, Research Fellow, Institute of Public Affairs, *Committee Hansard*, 2 November 2018, pp. 19–20.

28 Department of Jobs and Small Business, *Submission 14*, p. 2.

29 Peter Cully, Group Manager, Department of Jobs and Small Business, *Committee Hansard*, 2 November 2018, p. 7. Also see: pp. 5–6.s

30 Simon Duggan, First Assistant Secretary, Economic Division, Department of the Prime Minister and Cabinet, *Committee Hansard*, 2 November 2018, p. 10. Also see: Australian Government, *The Australian Government Guide to Regulation*, 2014, pp. 2 and 5, <https://www.pmc.gov.au/resource-centre/regulation/australian-government-guide-regulation> (accessed 30 November 2018).

The committee notes that duplication is most commonly raised, indicating perhaps the difficulty of coordination between regulators and jurisdictions.

2.27 The Deregulation Agenda has achieved a useful reduction in regulation (as measured by compliance cost savings). However, the committee expects any current momentum will be lost unless other key policy measures are successfully implemented (including instillation of a cultural attitude toward deregulation within regulators). The committee also recognises that there is debate regarding the appropriate method to quantify deregulation and that some reported decisions to effect compliance cost savings have not been implemented (and so cannot yet be claimed as savings).

2.28 The committee considers that it is important to accurately gauge the stock of Commonwealth regulation, which was last counted in 2014. This will help to monitor and assess progress, as well as to identify reform priorities, under the Deregulation Agenda. It will also contribute to engendering a whole-of-government attitude toward deregulation.

Recommendation 1

2.29 The committee recommends that the Australian Government, through the responsible agency (currently the Department of Jobs and Small Business), conduct a whole-of-government stocktake of Commonwealth regulation every three years.

Regulator Performance Framework

2.30 In 2014, the Australian Government established the Regulator Performance Framework (Framework), a key element of the Deregulation Agenda.³¹ Overall:

The Framework aims to encourage regulators to undertake their functions with the minimum impact necessary to achieve regulatory objectives and to effect positive ongoing and lasting cultural change within regulators. This can include adapting their approach, for example, to reduce burdens on small business. In turn this will also assist regulators in meeting community expectations, which will help build stakeholder and public confidence.

The Framework will allow regulators to report objectively on the outcomes of their efforts to administer regulation fairly, effectively and efficiently. It will also be a useful tool for regulators to identify opportunities for improvement and better target their resources for greater impact. The Framework will assist in highlighting where improvement of regulatory frameworks could reduce compliance costs.³²

31 Department of Jobs and Small Business, *Submission 14*, p. 2. The framework is based on recommendations formulated by the Organisation for Economic Co-operation and Development and the Productivity Commission.

32 Australian Government, *Regulator Performance Framework*, 2014, p. 4, https://docs.jobs.gov.au/system/files/doc/other/regulator_performance_framework.pdf (accessed 30 November 2018).

Key Performance Indicators

2.31 The Framework seeks to achieve its objectives by establishing a common set of six outcomes-based key performance indicators (KPIs). The KPIs cover matters such as communication, risk-based and proportionate approaches, transparency, regulatory burden reduction, and continuous improvement.³³ Each is underpinned by a description of better practice principles, measures of good regulatory performance, and examples of output/activity-based evidence.³⁴

2.32 In the interim inquiries, stakeholders expressed numerous concerns about Commonwealth regulators' performance under the Framework specifically relating to the KPIs more broadly. For example, in the pharmacy rules inquiry, the Grattan Institute submitted that the Department of Health needs to develop clear standards and processes for working with industry and lobby groups, as pharmacy regulation has been intractable despite several independent recommendations for reform.³⁵

2.33 For the policy and process inquiry, COSBOA's representative, Mr McKenzie, said 'what we have now is a very patchy adherence to the Regulator Performance Framework'. He emphasised the importance of good leadership and culture in creating positive relationships with stakeholders.³⁶

2.34 Dr Latham from ASBFEO suggested that performance under the Framework would be much improved if all staff within a regulatory agency were responsible for the Deregulation Agenda (not just within regulatory reform units or portfolio deregulation units):

The most effective way of doing it would be to make it everyone's job, not to make it someone's job. The [Australian Taxation Office] has done some great things around creating a small business area, and they are very attuned to small business. But the issue that we often see—and they are very good at fixing stuff—is that we have to have the problem and give it to them to fix it, because the areas doing the debt recovery or whatever it is haven't got small business necessarily in mind. The idea here is how to integrate that small-regulation-type deregulation idea into everyone's job.³⁷

33 For practical examples, see: Narelle Luchetti, General Manager, Digital Economy and Business Simplification Branch, Department of Industry, Innovation and Science, *Committee Hansard*, 2 November 2018, pp. 15–16; Department of Finance, *Submission 7*, pp. 1–3.

34 Australian Government, *Regulator Performance Framework*, 2014, pp. 15–27.

35 Senate Select Committee on Red Tape, Effect of red tape on the pharmacy rules, Grattan Institute, *Submission 6*, p. 3. This concern is directly referable to Key Performance Indicators 2 (Communication with regulated entities is clear, targeted and effective) and 5 (Regulators are open and transparent in their dealings with regulated entities).

36 Mark McKenzie, Chair, Council of Small Business Organisations of Australia, *Committee Hansard*, 2 November 2018, p. 17.

37 Dr Craig Latham, Deputy, Australian Small Business and Family Enterprise Ombudsman, *Committee Hansard*, 2 November 2018, p. 17.

Stakeholder consultation and engagement

2.35 The Victorian Chamber of Commerce and Industry highlighted the role of the Red Tape Commissioner (Victoria) in facilitating consultation with business on red tape reform priorities.³⁸ ASBFEO representative Dr Latham acknowledged that such a position would be useful at the federal level, but argued that there is a much deeper problem with stakeholder consultation and engagement:

The solution is much more holistic. It's the capability and the embedding of consultation and collaboration into government itself, for government to seek to understand our constituency, small business, to get a proper understanding of it, but not to sit in an office imagining what a small business looks like.³⁹

2.36 Mr McKenzie agreed that consultations are affected by 'a distance that has been created by the bureaucracy that is in place'. He said that stakeholders are typically given 'a preferred position and then three very obscure alternatives that are designed to make the preferred position look really good'. Mr McKenzie suggested that greater accountability, specifically in the process of regulatory impact analysis, would help to develop better regulation.⁴⁰

Creating a deregulation and red tape reduction culture

2.37 Witnesses considered the question of how to create a deregulation and red tape reduction culture.⁴¹ COSBOA expressed a view that the Framework should be 'compulsory for agencies at a whole-of-government level' and more robust to combat inconsistent application. Its representative, Mr McKenzie, suggested that potential disincentives should be actively managed, for example:

There is a potential loss of budget allocation as you start to close down regulations. There's maybe even a point where you're actually quarantining that money in terms of forward estimates for a period of two or three years where there is an opportunity for that money to be redeployed in value-producing elements, maybe in a policy or strategic area, so that the

38 Victorian Chamber of Commerce and Industry, *Submission 10*, pp. 6–7. Victoria also has a Commissioner for Better Regulation: Victoria State Government, 'Commissioner for Better Regulation, Red Tape Commissioner', <http://www.betterregulation.vic.gov.au/Home> (accessed 30 November 2018).

39 Dr Craig Latham, Deputy, Australian Small Business and Family Enterprise Ombudsman, *Committee Hansard*, 2 November 2018, p. 7.

40 Mark McKenzie, Chair, Council of Small Business Organisations of Australia, *Committee Hansard*, 2 November 2018, p. 10.

41 For example: Adam Carr, Chief Economist and Director, Economics and Industry Policy, Australian Chamber of Commerce and Industry, *Committee Hansard*, 2 November 2018, p. 19; Kurt Wallace, Research Fellow, Institute of Public Affairs, *Committee Hansard*, 2 November 2018, p. 20.

agency or department is actually protected in the near term and there is no disincentive to pull back.⁴²

2.38 Self Employed Australia's Mr Phillips offered some further suggestions, one of which would be for the Parliament to signal the intention with clear and simple primary legislation:

At the federal level there's a high art form of writing legislation that requires a QC's opinion to interpret. So, if parliament were to have its mind towards requiring legislative drafts people to write plain English legislation that gives clear instructions to the Public Service and that the general public has a fairly good chance of understanding as well, that would create checks and balances.⁴³

Department's response

2.39 An officer from the Department explained:

The focus on the [Framework], of how the regulators actually apply the regulation, is a key element, because...it's often the way in which the regulation is applied, and regulators being conscious of that...the other key part of it is about trying to ensure decision-makers and others don't reflexively reach for regulation as the answer to every problem but think about the regulatory burden and where it can be removed.⁴⁴

2.40 Regulators' performance is assessed through annual externally validated self-assessments.⁴⁵ The Department submitted that an internal review of these reports found high compliance for 2016–2017:

Generally, regulators acknowledged the benefits of the [Framework], including greater feedback from stakeholders and the flexibility to adjust how they reported to fit their needs. Over 90% of all Commonwealth regulators covered by the [Framework] had completed and published their self-assessment reports for the 2015–16 reporting cycle.⁴⁶

2.41 In relation to creating culture, a departmental representative stated that ministers are attentive to the Deregulation Agenda as it is an agenda of the Australian Government. Further, the officer considered that the regulatory reform units, or

42 Mark McKenzie, Chair, Council of Small Business Organisations of Australia, *Committee Hansard*, 2 November 2018, p. 20.

43 Ken Phillips, Executive Director, Self Employed Australia, *Committee Hansard*, 2 November 2018, p. 21.

44 Peter Cully, Group Manager, Department of Jobs and Small Business, *Committee Hansard*, 2 November 2018, p. 7.

45 Australian Government, *Regulator Performance Framework*, 2014, p. 8. This is complemented by a program of external reviews of a selected set of regulators every three years.

46 Department of Jobs and Small Business, *Submission 14*, p. 3. Also see: Rose Verspaandonk, Branch Manager, Small Business and Deregulation, Department of Jobs and Small Business, *Committee Hansard*, 2 November 2018, p. 16, who highlighted existing mechanisms to draw attention to perceived red tape issues.

deregulation units, within each portfolio are effective, including to instil a deregulatory attitude within portfolio areas. However:

Clearly there is more to be done. It's an ongoing process, in part because it involves changing the culture as much as applying rules.⁴⁷

Committee view

2.42 The Framework is crucial to reducing red tape and regulatory compliance costs, as it addresses the ways in which regulation is to be administered. As such, there is potential for significant impact on individuals, community organisations and businesses. According to stakeholders, Commonwealth regulators' performance against the Framework's KPIs is not consistent. The committee accepts that this is creating more than minimal impact, jeopardising positive cultural change within regulators, and diminishing stakeholder confidence.

2.43 Stakeholder consultation and engagement was a focal point of discussion in the policy and process inquiry, with regulators particularly accused of having no real concept or understanding of the small business sector. This concern echoed what the committee has heard from other sectors, leading the committee to believe that, in some respects, there is a fundamental disconnect between regulators and regulated entities, and between the purpose of regulation and its actual effects.

2.44 Regrettably, Commonwealth regulators and stakeholders offered few practical suggestions for creating culture change. The committee is pleased to note the Department's acknowledgement of the ongoing challenge, however.

2.45 In relation to performance reporting, the Australian Government's consolidated annual report is relatively up-to-date, notwithstanding machinery of government changes at the end of 2017. On the other hand, the publication of self-assessment reports by Commonwealth regulators has been tardy, if not non-existent. No explanation has been provided for these omissions.

2.46 The committee considers that each department and/or agency should be required to publish its self-assessment reports under the Deregulation Agenda as part of its annual report. This would increase transparency and accountability under the Deregulation Agenda, consistent with the KPIs, as well as providing opportunities to monitor progress and identify reform priorities.

2.47 The committee is also concerned that the KPIs may not be sufficiently clear or robust to avoid bureaucratic "interpretation" to negate their purpose. The committee would like to see each regulator obliged to focus on key questions, such as: What ill is the regulation intended to avoid? How well is it doing this? What are the other consequences of the regulation? Is there another way of achieving the intended outcome with fewer unintended consequences?

47 Peter Cully, Group Manager, Department of Jobs and Small Business, *Committee Hansard*, 2 November 2018, p. 5. Also see: Peter Cully, Group Manager, Department of Jobs and Small Business, *Committee Hansard*, 2 November 2018, pp. 16–17.

Recommendation 2

2.48 The committee recommends that the Australian Government amend the *Public Governance, Performance and Accountability Act 2013* (Cth) to require all Commonwealth bodies that administer, monitor or enforce regulation to publish the self-assessment reports provided to the Department of Jobs and Small Business as part of the Deregulation Agenda.

Recommendation 3

2.49 The committee recommends that the Australian Government revise policy measures implemented under the Deregulation Agenda to focus more on the reasons and purpose of Commonwealth regulation and to ensure that any such regulation is appropriate and proportionate.

Regulatory Impact Analysis

2.50 Regulatory Impact Analysis (RIA) is a systemic approach to critically assessing the positive and negative effects of proposed and existing regulations and non-regulatory alternatives. The Organisation for Economic Co-operation and Development notes that RIA is an important element of an evidence-based approach to policy making.⁴⁸

2.51 The RIA process undertaken during policy development is summarised in a Regulation Impact Statement (RIS), which is used to inform decision-makers. A RIS aims to quantify all regulatory costs and offsetting regulatory savings for policy proposals using a Regulatory Burden Measurement Framework.⁴⁹

Regulatory compliance costs

2.52 Stakeholders in the interim inquiries have raised concerns about regulatory compliance costs (actual and other) and their effect on individuals, businesses and industry. In the environmental assessment and approvals inquiry, for example, the Minerals Council of Australia submitted that regulatory delays on major greenfields mining projects can cost up to \$46 million each month, increasing business risk and making Australia less attractive for investment.⁵⁰

48 Organisation for Economic Co-operation and Development (OECD), 'Regulatory Impact Analysis', <http://www.oecd.org/regreform/regulatory-policy/ria.htm> (accessed 30 November 2018). The OECD notes that all its members have found implementation of Regulatory Impact Analysis administratively and technically challenging.

49 Department of Prime Minister and Cabinet, 'Regulatory Burden Measurement', <https://www.pmc.gov.au/regulation/regulatory-burden-measurement> (accessed 30 November 2018).

50 Senate Select Committee on Red Tape, Effect of red tape on environmental assessment and approvals, Mineral Council of Australia, *Submission 14*, p. 7. Also see: Ken Phillips, Executive Director, Self Employed Australia, *Committee Hansard*, 2 November 2018, p. 9, who provided an example currently affecting the transcription industry.

2.53 Domestically, there does not appear to be any independent study of the productivity and economic impacts of the Deregulation Agenda, notwithstanding a 2015 recommendation from the Australian National Audit Office.⁵¹

2.54 Stakeholders contended however that these impacts exist and are not properly quantified by regulators, partially due to consultation issues and the RIS process. ASBFEO representative Dr Latham suggested that the process might be improved by implementing an independent disclosure statement, as occurs in New Zealand:

The RIS is developed by the policy people. They're the ones that are closely involved in it. But, at the end of it, it gets handed across to a person who is generally more independent of that process. They have to do a disclosure statement of one page or two pages or whatever that points out the problems with the regulation and the development of it. So they will say, 'This bit of research wasn't done,' or 'We consulted, and they said this but we are not taking that advice.'⁵²

PM&C's response

2.55 PM&C's representative responded that Australia has a strong internal governance framework around regulation, and the Office of Best Practice Regulation (OBPR) assists regulators throughout the RIS process to 'to try and make [RISs] as strong as they can be'. Further:

Where our assessment is that it doesn't meet the requirements, whether it's in respect to consultation or something else, we give some pretty frank advice to the cabinet and some pretty independent advice on the quality of the [RIS], and we will call out, and are prepared to call out, those that do not meet those standards of evidence.⁵³

2.56 Officers noted that, from 2014–2018, Council of Australian Governments (COAG) Councils and national standards-setting bodies have prepared five RISs that did not support regulatory agreements/decisions. Commonwealth regulators have also presented non-compliant RISs:

There have been a number of occasions where the OBPR has assessed that the RIS has not been compliant with the RIS requirements, and often that's

51 Australian National Audit Office, *Implementing the Deregulation Agenda: Cutting Red Tape, Across Entities*, ANAO Report No. 29 2015–16 Performance Audit, 2016, p. 42 and Appendix 1, p. 46. The assessment was to be undertaken by the Productivity Commission or another equivalent body. Australia has improved its ranking in the World Economic Forum's Global Competitiveness Index, as well as the World Bank's Ease of Doing Business Index, since 2013–2014: World Economic Forum, *Global Competitiveness Report 2018*, 16 October 2018, pp. 75 and 77, <https://www.weforum.org/reports/the-global-competitiveness-report-2018>; World Bank, 'Ease of doing business index', <https://data.worldbank.org/indicator/IC.BUS.EASE.XQ?locations=AU> (both accessed 30 November 2018).

52 Dr Craig Latham, Deputy, Australian Small Business and Family Enterprise Ombudsman, *Committee Hansard*, 2 November 2018, p. 8.

53 Simon Duggan, First Assistant Secretary, Economic Division, Department of the Prime Minister and Cabinet, *Committee Hansard*, 2 November 2018, p. 10.

on the basis of not establishing a problem that is best addressed through further government regulation or national regulation of an issue.⁵⁴

2.57 In the same four-year period, 35 RISs were assessed by OBPR as not being best practice (for example, due to the need for greater definition of the policy problem being addressed or a higher level of consultation or representation of stakeholder views on the options and likely impacts).⁵⁵ An officer said:

If we find that something doesn't meet best practice, we have a process where we have a post-implementation review. Within five years of implementing a major regulatory change which has substantial or widespread impact on the economy, or within two years where an adequate RIS was required but not prepared, we will require an agency to do a post-implementation review.⁵⁶

2.58 However:

At the end of the day, the ministerial council, or whatever decision-maker it is, still has the ability to make a decision regardless of what is in a RIS and regardless of whether an adequate RIS has been prepared by the secretariat or the department that's advising them.⁵⁷

Committee view

2.59 RIA did not receive as much attention from stakeholders as those processes likely deserve. This is somewhat perverse given the numerous concerns about regulatory compliance costs and the Deregulation Agenda's stated objectives of boosting productivity and the Australian economy.

2.60 Time and time again, stakeholders highlighted regulatory compliance costs as an ongoing issue, suggesting the matter has not yet been adequately addressed. The committee acknowledges that there could be several reasons for this lack of resolution—for example, insufficient consideration by regulators, difficulty in quantifying actual and other costs, et cetera. Significantly, there is no comprehensive and independent evaluation of productivity and economic impacts of the Deregulation Agenda, a situation that ought to be expeditiously remedied.

54 Chris Toyne, Office of Best Practice Regulation, Department of the Prime Minister and Cabinet, *Committee Hansard*, 2 November 2018, p. 12. Also see: Department of the Prime Minister and Cabinet, *Submission 2*, p. 3. Also see: Simon Duggan, First Assistant Secretary, Economic Division, Department of the Prime Minister and Cabinet, *Committee Hansard*, 2 November 2018, p. 12.

55 Department of Prime Minister and Cabinet, *Submission 2*, p. 2.

56 Simon Duggan, First Assistant Secretary, Economic Division, Department of the Prime Minister and Cabinet, *Committee Hansard*, 2 November 2018, p. 22.

57 Chris Toyne, Office of Best Practice Regulation, Department of the Prime Minister and Cabinet, *Committee Hansard*, 2 November 2018, p. 12.

Recommendation 4

2.61 The committee recommends that the Australian Government initiate a five-year review by the Productivity Commission of the productivity and economic impacts of the Deregulation Agenda.

2.62 In addition, and to complement Recommendation 4, the committee considers that Commonwealth regulators would benefit from having regular stakeholder feedback on the business impacts of the Deregulation Agenda (similar to the ACCI's Red Tape Survey). This feedback would enable regulators to monitor those impacts, formulate better regulation, and most importantly, build better relationships with regulated entities.

Recommendation 5

2.63 The committee recommends that the Australian Government, in collaboration with the Australian Chamber of Commerce and Industry and the Council of Small Business Organisations Australia, develop a red tape survey to be conducted every two years, to ascertain stakeholders' views on the practical operation and outcomes of the Deregulation Agenda.

Reasons for regulation

2.64 Stakeholders maintained throughout the interim inquiries that there is a role for government regulation—for example, to prevent harm (the occupational licensing inquiry), to ensure quality (the childcare inquiry), et cetera. However, they distinguished between good and bad regulation, as did witnesses to the policy and process inquiry.

Philosophical bases for regulation

2.65 The IPA's representative affirmed its support for minimal regulation (based on John Stuart Mill's harm principle), which it defined as only that which is necessary to achieve a public policy goal. Kurt Wallace, Research Fellow, argued that this threshold is well exceeded in Australia:

Red tape should be defined as regulation that goes over and beyond what is necessary to achieve a public policy goal. In Australia we have a huge regime of licensing laws and regulation in other areas that go well beyond protecting basic 'do no harm to others'.⁵⁸

2.66 Mr McKenzie from COSBOA argued that the prevention of harm is only one objective of regulation: regulation also aims to protect the vulnerable (John Rawls' theory of natural justice) and to maximise outcomes for the greatest good (Jeremy Bentham's theory of utilitarianism).⁵⁹

58 Kurt Wallace, Research Fellow, Institute of Public Affairs, *Committee Hansard*, 2 November 2018, p. 4.

59 Mark McKenzie, Chair, Council of Small Business Organisations of Australia, *Committee Hansard*, 2 November 2018, p. 4. Also see: Ken Phillips, Executive Director, Self Employed Australia, *Committee Hansard*, 2 November 2018, pp. 3–4, who cited unfair contract laws as an example of good regulation that protects small business from large business.

2.67 While Mr Lesh agreed that utilitarianism is 'a good backing principle', he cautioned:

The issue with the Benthamite logic is that it's often used as a public interest justification for, really, any government action. In practice, when you start saying, 'Well, we need to maximise the greatest good,' basically you can try to frame your regulation in terms of the greatest good, when in fact it's serving a narrower interest...Quite often what happens in regulatory debates is that every individual piece of regulation is put in very logically and rationally and—not to impugn motives—often with the best of intentions but, in fact, the outcomes and the results of the regulation are not in the greatest good and do not actually benefit the people they are supposed to benefit.⁶⁰

2.68 ACCI identified a fourth rationale for regulation: to establish trust and integrity in a market. Its Chief Economist and Director of Economics and Industry Policy, Adam Carr, said: 'at a simple level, if you're a consumer and you're buying honey, shoes or whatever that you get what you pay for and you can be sure of that'.⁶¹

2.69 Witnesses considered whether consumer protection laws (based on Mill) sufficiently protect consumers, so as to render regulation unnecessary. ASBFEO and COSBOA representatives concluded that this is not the case because of access to justice issues. Mr McKenzie explained:

When you actually look at the various actors in an economic market or in a commercial situation, they have varying levels of access to justice...if we look at the misuse of market power, which has been an element of Australian Consumer Law that has existed for more than 20 years...there was not a single prosecution that was actually brought under that law.⁶²

2.70 Alternatively, Mr Wallace suggested that the consumer protection laws themselves are unnecessary, as markets have built-in mechanisms for guarding against abuses: 'if a business is not living up to community expectations, they're going to face the discipline of the market'.⁶³

2.71 IPA colleague Mr Lesh contended that business often supports regulation, as it acts as a barrier to reduce competition in the market.⁶⁴ COSBOA denied that

60 Matthew Lesh, Research Fellow, Institute of Public Affairs, *Committee Hansard*, 2 November 2018, p. 5.

61 Adam Carr, Chief Economist and Director, Economics and Industry Policy, Australian Chamber of Commerce and Industry, *Committee Hansard*, 2 November 2018, p. 4.

62 Mark McKenzie, Chair, Council of Small Business Organisations of Australia, *Committee Hansard*, 2 November 2018, p. 5. Also see: Dr Craig Latham, Deputy, Australian Small Business and Family Enterprise Ombudsman, *Committee Hansard*, 2 November 2018, p. 5, who advised that half of small businesses has to abandon disputes for access to justice reasons (for example, due to the cost of litigation).

63 Kurt Wallace, Research Fellow, Institute of Public Affairs, *Committee Hansard*, 2 November 2018, p. 4.

64 Matthew Lesh, Research Fellow, Institute of Public Affairs, *Committee Hansard*, 2 November 2018, p. 2.

small business is looking for protection from big business but is instead seeking 'for perversities in the existing economic ecosystem to be addressed'. Mr McKenzie said:

If we look at the economic ecosystem that we're working in now, it's a sub-element of a global system. We're living in an economy that actually suffers from a lack of scale; so, as a result, there's a need to address some of the perversities that operate in the ecosystem. So regulation, from our perspective, actually is a very powerful way of government being able to address, if you like, limitations in the operation of the market so that the market can operate with true and fair competition but also ensure that it meets the societal aspirations of our community in terms of economic, environmental and social fabric.⁶⁵

2.72 Mr Phillips from Self Employed Australia appeared to agree:

A properly functioning free market is in fact a regulated market and it's a checks-and-balances situation...the task of government in the regulation area with a market economy is to allow everyone the capacity to aspire to become a monopolist but always frustrate the achievement of that. To me, that's the balancing act that you're looking to achieve in the regulation sphere.⁶⁶

Committee view

2.73 The committee acknowledges that there are philosophical justifications for regulation. However, as highlighted overwhelmingly by stakeholders, the level and type of regulation must be targeted and appropriate otherwise, it runs the risk of becoming bad regulation or red tape. The committee recognises that this can be a delicate balancing exercise that may produce adverse and unintended outcomes, and that a 'feedback loop' prompting regular review is needed to avert this as much as possible.

Findings and conclusions of the interim inquiries

2.74 As noted in chapter one, the committee has conducted eight interim inquiries into the effect of red tape in specific sectors. The interim reports are available at the committee's website, however the committee's findings are outlined below and its recommendations are presented in Appendix 3.

Effect of red tape on the sale, supply and taxation of alcohol

2.75 The committee found that red tape is affecting businesses that sell and/or supply alcohol, with consequent impacts on job creation, business growth and investment. The committee heard in particular that taxation reform is long overdue.

65 Mark McKenzie, Chair, Council of Small Business Organisations of Australia, *Committee Hansard*, 2 November 2018, p. 3.

66 Ken Phillips, Executive Director, Self Employed Australia, *Committee Hansard*, 2 November 2018, p. 2. Mr Phillips considered the pharmacy location rules an example of bad regulation as they 'give an artificial monopoly to a current existing player': p. 6.

Based on its findings, the committee made three recommendations to which the Australian Government has not responded.

Effect of red tape on tobacco retail

2.76 In this inquiry, the committee received substantial evidence of high levels of regulation adversely affecting businesses that legally retail tobacco products. The committee was concerned to ensure that regulation is evidence-based, including in relation to alternative nicotine delivery systems. The committee made three recommendations to which the Australian Government has not responded.

Effect of red tape on environmental assessment and approvals

2.77 The committee heard that environmental assessment and approvals are over-regulated at all levels of government, with adverse small and large-scale economic consequences. The committee considered that there are opportunities to streamline regulatory functions and to eliminate red tape. The committee made 15 recommendations and received a response from the Australian Government (response tabled 13 July 2018).

Effect of red tape on health services

2.78 The committee found that red tape in health services is affecting the operation of healthcare businesses and the provision of services to healthcare consumers. The committee considered that there are several areas in which reform would benefit consumers but noted that healthcare reform is slow to arrive. The committee presented seven recommendations for this inquiry to which the Australian Government has responded.

Effect of red tape on pharmacy rules

2.79 In its fifth interim inquiry, the committee heard that red tape continues to unnecessarily and adversely affect the operation of community pharmacies, to the detriment of consumers and contrary to the National Medicines Policy. The committee questioned the rationale for certain regulation—pharmacy location and ownership rules in particular—which it considered anti-competitive and not consumer oriented. The committee made six recommendations but has not received a response from the Australian Government.

Effect of red tape on child care

2.80 For this inquiry, the committee found a high level of in principle support for regulation in the childcare sector, but not necessarily for the volume and breadth of regulation. The committee agreed that wherever possible red tape should be identified and eliminated, especially as the recently introduced Child Care Subsidy scheme matures. The Australian Government has responded to these recommendations (response tabled 15 November 2018).

Effect of red tape on occupational licensing

2.81 The committee questioned the rationale for occupational licensing, which it considered is a barrier to market entry. Acknowledging that this is largely a matter for state and territory governments, the committee made four recommendations that it

considered would help progress licensing reform throughout Australia. The Australian Government has responded to the committee's seven recommendations (response tabled 15 November 2018).

Effect of red tape on private education

2.82 For its penultimate inquiry, the committee found that there are high levels of poor regulation and red tape affecting the private education sector. The committee expressed concern at these impacts on providers, students, industry and the economy, and noted that little progress appears to have been made in relation to deregulation and red tape reduction. The committee supported the need to better quantify regulatory compliance costs and improve regulators' performance. The Australian Government has not yet had the opportunity to consider and respond to these recommendations.

Committee view

2.83 The committee notes that, over a two-year period, it has conducted several interim inquiries and made multiple recommendations aimed at improving Commonwealth and other regulation across a range of sectors. While the Australian Government is expected to respond to reports in a timely manner (within three months of tabling), the government has for the most part chosen not to do so. The committee considers this response disappointing, contrary to the development of better regulation and indicative of a waning lack of interest in deregulation.

Concluding comments

2.84 The Australian Government has shown a commitment to deregulation and red tape reduction. Its Deregulation Agenda, built upon previous like-minded efforts, has achieved certain successes, including internal governance frameworks. However, the business sector unequivocally argues that the Deregulation Agenda is yet to deliver the substantive outcomes it set out to achieve. The inescapable conclusion is that the key policy measures and/or their implementation require further, more detailed consideration. Based on information presented, the latter would appear to be the case. If this can be achieved, the Deregulation Agenda might yet deliver ongoing and permanent deregulation, as well as better regulation.

David Leyonhjelm

Chair